STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2012
V	No. 300582 Wayne Circuit Court
KARON MALCOM X COLE, Defendant-Appellant.	LC No. 10-006411-FC

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

Following his bench trial, defendant was convicted of carjacking, MCL 750.529a.[1] He was sentenced to 81 months to 15 years' imprisonment. Defendant appeals arguing that his conviction was not supported by sufficient evidence. We reverse and vacate defendant's conviction.

Defendant was the front seat passenger in a Ford Focus parked at a gas station when the back seat passenger, Anthony Simmons, got out of the car and carjacked Denise Smith's Chrysler 300C, that was parked at another gas pump.

Defendant argues on appeal that there was insufficient evidence presented at trial to convince a rational trier of fact beyond a reasonable doubt that defendant aided and abetted Simmons in the carjacking. We agree.

This Court reviews a claim of insufficient evidence de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find the elements of the crime were proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). However, this Court generally should not disturb the fact-finder's determinations of the credibility of witnesses or the weight of the evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (citing *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992)).

[1] Defendant was acquitted of receiving and concealing stolen property, MCL 750.535(7)

The elements of carjacking, MCL 750.529a, are: (1) taking a motor vehicle from another person (2) in the presence of that person, a passenger, or any other person in lawful possession of the vehicle (3) by force or violence, by threat of force or violence, or by putting the other person in fear. *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998) (citing *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998)). A defendant who aids or abets the commission of a crime is punished as if he had directly committed the crime. MCL 767.39.

To convict under an aiding and abetting theory, the prosecution must show: "'the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.'" *People v Plunkett*, 485 Mich 50, 61; 780 NW2d 280 (2010) (quoting *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006)). "The phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004) (citing *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974)).

"The 'requisite intent' for conviction of a crime as an aider and abettor 'is that necessary to be convicted of the crime as a principal.'" *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001) (quoting *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985)). An aider or abettor's intent can be inferred from all the facts and circumstances. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999) (quoting *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled in part on other grounds *Mass*, 464 Mich 615)). To establish the element of intent for aiding and abetting, the prosecution must show that the defendant intends to commit or is aware that the principal will commit a crime, or the crime is an "'incidental consequence' which might reasonably be expected to result from the intended wrong." *Robinson*, 475 Mich at 9 (quoting Perkins, Criminal Law (3d ed), p 745).

Factors that may be determined when considering a defendant's guilt under an aiding and abetting theory are a close association between the defendant and the principal, evidence that the defendant helped plan or execute the crime, and evidence of the defendant's flight after the crime is committed. *Carines*, 460 Mich at 757-758 (quoting *Turner*, 213 Mich App at 568-569). Mere presence at the scene of the crime, even if the defendant has knowledge that the crime is going to be committed, is insufficient to convict under an aiding and abetting theory. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999) (citing *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992)).

Here, defendant makes no argument that the crime of carjacking did not occur. He asserts that there is insufficient evidence that defendant "performed acts or gave encouragement that assisted the commission of the crime," while intending or knowing that Simmons intended to commit the carjacking. *Plunkett*, 485 Mich at 61. The evidence shows defendant was a passenger in the Ford Focus at the time the carjacking occurred, and was watching Smith and

Simmons after Smith got out of her Chrysler.[2] Defendant remained in the Focus as it drove away, either following or leading Simmons in the Chrysler. Defendant was arrested five days later in the Focus, which was also carjacked, along with Simmons and two other individuals.

The evidence is not sufficient to convict defendant of aiding and abetting a carjacking. There is no evidence that defendant took any action other than watching Smith and Simmons. He was not the driver of the Focus. There is no evidence that he knew before the incident that Simmons or the driver of the Focus intended to commit a carjacking. The prosecution's theory was that defendant was a lookout, but there is no evidence he ever warned the other actors of anything, and the evidence indicates he was looking only at Simmons and Smith, rather than at his surroundings, in order to see if anyone was approaching. There was no testimony from the other actors regarding defendant's intent or actions. There is no evidence of how long defendant had known the other actors, how long he had been in the Focus, how long the Focus was at the gas station, or whether defendant had any influence over Simmons or the driver of the Focus. We cannot distinguish defendant's actions from those of a purely innocent passenger who was unaware of what would transpire at the gas station.

The trial court stated the following when it made its findings of fact:

> [Defendant] certainly knew that Mr. Simmons carjacked cars because he saw him do it.
>
> The fact that Mr. Simmons committed violent crimes, carried a gun and robbed a woman of her purse and car did not affect Mr. Cole's willingness to associate with and befriend Mr. Simmons. By voluntarily choosing to join a group of two other men who were intent on committing the crime of carjacking, Mr. Cole took action which supported, encouraged and incited its commission. Mr. Cole then acted as Mr. Simmons' look-out and left the scene with Mr. Simmons.

Several of these findings of fact are clearly erroneous. There is no evidence defendant saw Simmons commit any carjacking before the incident in question. Although the trial court stated that the Focus was carjacked on May 9, 2010, which could lend support to the theory that defendant knew Simmons was a carjacker before this incident, there is no evidentiary basis for that finding anywhere in the record. Even if the Focus had been carjacked on May 9, 2010, there is still nothing in the record to indicate defendant knew it was carjacked, either before the incident or at the time of defendant's arrest. There is also no evidence defendant knew Simmons committed violent crimes or carried a gun before this incident.

Additionally, defendant could not know Simmons had robbed Smith or carjacked her Chrysler before it had actually occurred, so his voluntary association with them on that day could

[2] Smith could not see defendant in the Focus until she got out of her car, so she did not know whether he had observed the entire incident. Although it is a reasonable inference, this alone is insufficient to show defendant was aiding and abetting.

not have been tainted by that knowledge. Furthermore, associating with people who intend to commit a crime is insufficient to be found guilty on a theory of aiding and abetting; there must be actual assistance or encouragement as well as intent or knowledge that the principal intends to commit the crime. *Plunkett*, 485 Mich at 61. Finally, there is no indication in the record that defendant knew Simmons and the driver of the Focus intended to commit a carjacking that day. Therefore, we hold there is insufficient evidence to convince a rational trier of fact beyond a reasonable doubt that defendant was guilty aiding and abetting carjacking.

Defendant also claims on appeal that prior record variable 1 was scored improperly by the trial court, leading to a sentence outside the appropriate sentencing guidelines range. Because we have vacated defendant's conviction, we need not reach this issue.

Reversed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey